Volume 60 | Issue 2 Article 9

February 1958

Criminal Law--Delay in Arraignment--Admissibility of Confessions

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CRIMINAL LAW—DELAY IN ARRAIGNMENT—ADMISSIBILITY OF CONFESSIONS.—Petitioner, a nineteen year old lad of limited intelligence who was arrested by police on suspicion of rape, was questioned for half an hour, then given a lie detector test, and subjected to another lie detector test after four more hours of detention, before he confessed to the crime. Although arraignment could have been effected the afternoon of the arrest, the police did not bring the petitioner before a commissioner until the next morning. *Held,* that arraignment "without unnecessary delay", as required by FED. R. CRIM. P. 5(a), 18 U.S.C. (1946), is not made, and a confession obtained by the police during a period of delay is not admissible, where the police detained the accused for an extended period between arrest and arraignment for purposes other than administrative details. *Mallory v. United States,* 77 Sup. Ct. 1356 (1957).

The prevailing line of authority prior to *McNabb v. United States,* 318 U.S. 332 (1943), upon the admissibility of confessions, was expressed in *Ward v. Texas,* 316 U.S. 547 (1942), wherein the Court held that the criteria to be used in determining the admissibility of a confession was whether or not it was given voluntarily. See also, *Wilson v. United States,* 162 U.S. 613 (1896); 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940). The fact that Mallory, or any accused, had confessed while detained and his arraignment delayed would have been merely an element to be considered in this regard. *Chambers v. Florida,* 309 U.S. 227 (1940). The *McNabb* case, however, held that under FED. R. CRIM. P. 5(a) (which requires that any person arrested be brought without unnecessary delay before the nearest available commissioner), even a voluntary confession obtained from one illegally detained due to failure to arraign the prisoner promptly would be held inadmissible by virtue of the illegal delay. Note well, nevertheless, that, even under the *McNabb* rule, a confession legally obtained is not rendered inadmissible by a subsequent illegal detention. *United States v. Mitchell,* 322 U.S. 65 (1944). Certain of the lower federal courts, either misapprehending the holding in the *McNabb* case, or attempting to circumvent the implications of the *McNabb* rule, held that in the absence of "third degree" tactics by police officers, the rule would not apply. See, *e.g., United States v. Heitner,* 149 F.2d 105 (2d Cir. 1945); *United States v. Corn,* 54 F. Supp. 307 (E.D. Wisc. 1944). Mr. Justice Black, in the famous *Upshaw* case, reiterated the law of the *McNabb* case and was explicit in ruling that ". . . the plain purpose of the requirement that prisoners should promptly

be taken before committing magistrates was to check resort by police officers to secret interrogations of persons accused of crime;" and that, moreover, the voluntary or involuntary character of a confession obtained before arraignment is of no moment in cases where arraignment is not effected as expeditiously as practical. *Upshaw v. United States,* 335 U.S. 410 (1948).

In applying the *McNabb* rule as amplified by the *Upshaw* case, the federal courts were apparently not persuaded that the Supreme Court had settled the question of an unnecessary delay as affecting the admissibility of a confession obtained during the delay. Several decisions illustrated the lower court's impression that an illegal detention before presentment to a committing magistrate, standing alone, does not invalidate a confession made during its continuance. See, *e.g., Allen v. United States,* 202 F.2d 329 (1952); *Haines v. United States,* 188 F.2d 546 (1951). Still other federal decisions followed the *McNabb* and *Upshaw* cases, *supra. Garner v. United States,* 174 F.2d 499 (1949).

The principal case, in reaffirming the *McNabb* rule, should do much to encourage and establish unanimity of opinion in the federal courts regarding the effect of an illegal detention upon a confession obtained during its continuance. Mr. Justice Frankfurter has written a clear and lucid manual on the law of arrest and detention for federal officers. Arrest must not be based upon "mere suspicion but only on probable cause;" arraignment is to be effected "as quickly as possible" so that the issue of probable cause may be determined and the prisoner be apprised of his rights; the Court does not, however, command "mechanical or automatic" obedience; rather, the Court grants to policemen a limited area of tolerance within which to operate effectively, and to pause, perhaps, to check a story volunteered by the accused. *Mallory v. United States,* 77 Sup. Ct. 1536, 1539 (1957). The evil sought to be prevented is that of a deliberate delay in arraignment to afford an opportunity for secret interrogation.

The problem of admissibility of evidence obtained between arrest and arraignment presents a classic situation of frequently conflicting interest: the protection of individual rights as opposed to adequate social protection.

There are several examples of failure to convict guilty persons because of the operation of the *McNabb* rule. *United States v. Klee,* 50 F. Supp. 679 (D.C. Wash. 1943). Law enforcement agen-

cies argue that a policeman, acting with the most commendable motives and abstaining from any techniques of physical or psychological coercion, may merely detain the prisoner for a sufficient time to interrogate him concerning the crime, only to discover that to question an accused person before an alibi can be devised and at the time when the individual is most favorably disposed toward confession and repentence, is to violate the requirements of criminal procedure. From this point of view, society is compelled to suffer doubly when the voluntary confession of an accused is vitiated by the wrongdoing of a policeman.

The Court, however, imbued with the spirit of civil libertarianism, has adopted the more enlightened view and ruled that the possible sacrifice of social safety is of no consequence when weighed against the prospect of delayed arraignment, the temptation of intensive interrogation, and the ultimate use of the "third degree," before an individual is acquainted with his rights by being brought before a commissioner. Not only must the individual be informed of his privileges, but of equal importance is the fact that, without prompt arraignment and a determination of whether the arrest was founded on "probable cause" or mere suspicion, the law enforcement agencies would be free to arrest upon mere suspicion, hold the suspect imcommunicado, subject him to the "third degree" and to obtain convictions with confessions obtained by such reprehensible methods.

To suggest that innocent persons have nothing to fear from the hazards of these abuses, that only the criminal element will be affected, is to approve the indefensible methods of a former period which our more sophisticated society may desire to avoid.

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EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—NECESSITY OF PROCEEDING AGAINST CLIENT.—A legislative committee, in pursuance of investigating a parole violation, announced that it would hold a public hearing in which a tape recording of conversations between an attorney and his client would be disclosed. The attorney and client sought an injunction to restrain the committee from using the recording in such manner, alleging that the conversations were recorded, illegally and without consent, in the consulting room of the county jail. The decision of the Supreme Court at Special Term granting the injunction was reversed by the Appellate Division.